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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No. 137.

Aetna Life Insurance Company, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners*,

vs.

Samuel D. Moses, an Individual, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

H. Clay Espey,
Attorney for Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion filed in the cause in the Supreme Court of the District of Columbia (R. 17) is not reported.

The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 24), and is reported in 57 F. (2d) 440.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered March 7, 1392 (R. 31). The petition for a writ of certiorari was filed June 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Who are the proper party or parties plaintiff in an action brought in the District of Columbia against a third party whose negligence caused the death of an employee whose widow accepted compensation in accordance with the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. at Large 1424; made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600)?

Statement.

The petitioners in their petition (pages 2 to 5) have correctly detailed the statement of the case, and in that connection it is thought necessary only to call attention to the fact that this statement says that this case involves the construction and interpretation of Section 33 (a) (b) (d) and (e) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424) (quoted on page 39 of the appendix to petitioners' brief) as applied for the purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). It is the contention of the respondent that this case also involves the construction and interpretation of the District of Columbia "Lord Campbell's Act"

as provided in Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303 (quoted on page 42 of the appendix to petitioners' brief), as well as the construction and interpretation of the District of Columbia Workmen's Compensation Act.

Attention is also called to the fact that the Supreme Court of the District of Columbia, in sustaining the motion of the defendant (respondent herein), to strike out the declaration of the plaintiffs (petitioners herein), granted leave to the plaintiffs to amend within twenty days (R. 18), and that the plaintiffs did not take advantage of this permission.

For the purpose of clarity, we shall hereafter refer to the petitioners as plaintiffs and to the respondent as defendant.

ARGUMENT.

I.

The question here presented is of minor importance as it involves merely a formal matter of pleading in the Supreme Court of the District of Columbia, and does not affect the substantive rights of the parties. The defendant, by his motion to strike out the declaration for misjoinder of parties plaintiff, did not deny a cause of action against him, but merely that the pleading was not in proper form. The defendant did not deny that any of the plaintiffs had a beneficial interest in the cause of action against him. As far as the substantive rights of the parties are concerned, it is immaterial in whose name the suit is brought. At common law, even though an assignee had to sue in the name of the assignor, the assignee had the beneficial and equitable ownership of the cause of action, and could control the suit absolutely. *Welch* v. *Mandeville,* 1 Wheat.

233, 4 L. Ed. 79; *Irvine* v. *Lowry,* 14 Peters 293, 10 L. Ed. 462; *Karrick* v. *Wetmore,* 22 App. D. C. 487.

The trial court decided merely that the common law rule applied in this case and held among other things that neither the Aetna Life Insurance Company nor Harry M. Bralove could be legal parties plaintiff. The plaintiffs were given twenty days to amend the declaration. They refused, however, to avail themselves of this privilege, electing to stand on their declaration.

II.

The District of Columbia Compensation Act does not create a new cause of action at law against third persons whose negligence causes the death of another. Prior to the Compensation Act, the only cause of action for wrongful death was under the District of Columbia "Lord Campbell's Act", Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303, (quoted on page 42 of the appendix to plaintiffs' brief) except under the Employers' Liability Act which is not applicable to the present case. There is no language in the Compensation Act expressly creating a new cause of action. The fact that there are inconsistencies between the Compensation Act and the "Lord Campbell's Act" does not, as plaintiffs contend, create a new cause of action. If the Compensation Act creates a new cause of action for the death of an employee who is covered by workmen's compensation, caused by the negligence of a third person, then the latter would be subjected to double liability. Congress did not intend such a result. The Compensation Act was intended primarily to regulate the rights and duties between employer and employee, and not those of strangers to the employment. *Silvia* v. *Scotten,* 32 Del. 295, 299; 122 A. 513.

Both the Compensation Act and the "Lord Campbell's Act" must be construed strictly as they are in derogation

of the common law. *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648, 655, 59 L. Ed. 1160; *Ross* v. *Jones*, 89 U. S. 576, 591, 22 L. Ed. 730; *Brunswick Terminal Co.* v. *National Bank*, 192 U. S. 386, 390, 48 L. Ed. 491.

III.

Under "Lord Campbell's Act", the only person who may bring suit is a personal representative of the deceased. The personal representative of the deceased is the executor or administrator and none other. *Fleming* v. *Capital Traction Co.*, 40 App. D. C. 489; *Ferguson* v. *Railway Co.*, 6 App. D. C. 525.

In the case of *Luckey* v. *Union Pacific R. Co.*, 117 Nebr. 85, 219 N. W. 802, decided under statutes very similar to those in this jurisdiction, the court held that an action similar to that of the instant case should be brought in the name of decedent's personal representative.

IV.

Harry M. Bralove is not a proper legal party plaintiff. The Compensation Act, Sec. 33b, assigns to Bralove "all right of the person entitled to compensation". In this case, this right is merely the distributive share to which "the person entitled to compensation" is entitled under "Lord Campbell's Act". As the personal representative, and not one of those entitled to a distributive share under the death statute, is the only proper legal plaintiff under "Lord Campbell's Act", the employer Bralove could not acquire a greater right than his statutory assignor.

Even if it be held that the Compensation Act assigned the entire right of the personal representative of the deceased to Bralove, Bralove would not be entitled to sue in his own name, as the Compensation Act fails to give the

employer such express authorization. At common law, an assignee may not sue in his own name without special statutory authority. *Glenn* v. *Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Taylor* v. *Anderson*, 275 U. S. 431, 72 L. Ed. 354; *Met. Coach Co.* v. *Freund*, 42 App. D. C. 283; *The Com. Nat'l Bank* v. *Consumers' Brewing Co.*, 16 App. D. C. 186; *Armstrong, Whitworth & Co.* v. *Norton*, 15 App. D. C. 223.

The common law in this respect applies in the District of Columbia, and has been changed to permit an assignee to sue in his own name only in the case of an assignment of a judgment or of certain contract claims. Code D. C. 1924, c. 11, Secs. 431, 432, 433, and 434.

V.

The Aetna Life Insurance Company is not a proper legal party plaintiff. Although the Compensation Act does make some sort of an assignment to the employer, it makes none whatever to the insurance carrier. "Employer" and "carrier" are not interchangeable, as the plaintiffs contend. The Compensation Act does not expressly make them so, as do compensation acts in some states. It is significant that Section 35 of the Compensation Act (quoted on page 40 of the appendix to the plaintiffs' brief), in imposing the duties of the employer upon the insurance carrier, makes no mention of conferring the rights of the employer upon the carrier. The plaintiffs' argument, on page 16 of their brief, that "employer" and "carrier" are synonymous because the Compensation Act does not make them mutually exclusive, is obviously fallacious.

The Aetna Life Insurance Company is not a proper legal party plaintiff as assignee under the provisions of Bralove's Workmen's Compensation Insurance Policy with the Aetna Life Insurance Company because under the common

law, as still applied in the District of Columbia, an assignee is not a proper legal party plaintiff. *Glenn* v. *Marbury, supra.*

The Aetna Life Insurance Company is not a proper legal party plaintiff as indemnitor of the employer Bralove under the latter's Workmen's Compensation Insurance Policy with the former. *St. Louis, I. M. & S. R. Co.* v. *Com. Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Southern Railway Co.* v. *Blunt & Ward*, 165 Fed. 258, 260.

These cases show that while an insurance company, subrogated to the rights of the insured, may bring suit in its own name as legal plaintiff in equity or in admiralty, the common law rule applied in Federal Courts in actions at law is that the insurance company must not name itself as legal party plaintiff in such subrogation action. Only where statute permits, may an insurance company bring such an action in its own name in a law court, as in the case of *Travelers' Ins. Co.* v. *Engineering Works*, cited on p. 18 of the plaintiffs' brief, where an Ohio statute permitting suit to be brought in the name of the real party in interest, was held to abrogate the old common law rule. The cases of *Kokusai Kisen Kabushiki Kaisha*, 44 F. (2d) 659, and of the *Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, cited by the plaintiffs, were both correctly decided because it has long been the rule in admiralty that the equitable owner of a chose in action or the assignee of a chose in action may bring suit in his own name without naming the legal owner of a chose in action as a nominal plaintiff. *St. Louis, I. M. & S. R. Co.* v. *Com. Ins. Co., supra; The Propellor Monticello* v. *Mollison*, 17 How. 153, 15 L. Ed. 68; *The Liberty No. 4*, 7 Fed. 226.

The Aetna Life Insurance Company is not a proper legal party plaintiff under District of Columbia Supreme Court Equity Rule 13 (cited on p. 30 of the plaintiffs' brief) as real party in interest because this rule merely states a long

established rule of equity procedure in force in the District of Columbia even before assignees of contract claims could sue in their own name at law. *Young* v. *Kelly*, 3 App. D. C. 296.

Decisions of the courts of other jurisdictions are of little help in construing the District of Columbia statutes because the compensation statutes or rules relating to suits by assignees generally vary from state to state. Where insurance carriers or employers are permitted to sue in their own names the third parties whose negligence has caused the death of the employees, the state statute expressly permits such procedure. *Silvia* v. *Scotten, supra; Mass. Bonding & Ins. Co.* v. *San Francisco Oakland Terminal Railways*, 39 Cal. App. 388, 178 Pac. 974.

VI.

Neither Anna Roberts, as an individual, nor the Aetna Life Insurance Company is a proper use plaintiff. The only right of Anna Roberts is her portion of the distributive share of any excess of the recovery over $7,500.00 against the defendant. Under "Lord Campbell's Act" and decisions construing it, one entitled to merely a distributive share is not a proper party plaintiff, either legal or use. The fact that Anna Roberts has a possible interest would not entitle her to be a use plaintiff under District of Columbia Supreme Court Equity Rule 13 (cited on pages 30 and 44 of plaintiffs' brief) because this rule merely applies a long established rule of equity practice which would not override the clear terms of a statute applying only to a law action. The Aetna Life Insurance Company is not a proper use plaintiff because an unliquidated tort claim may not be assigned in the District of Columbia. *Lamont* v. *Wash. & Georgetown Railroad Co.*, 2 Mackey 502, 47 A. R. 268.

CONCLUSION.

If any plaintiffs, legal or use, were improperly joined, the lower courts did not err in sustaining the defendant's motion to strike out the declaration for misjoinder of plaintiffs.

No question of merit is presented by the petitioners, and the petition for the writ of certiorari should be denied.

Respectfully submitted,

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